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COURT OF APPEALS

STATE OF NEW YORK

PALLADINO,

Appellant,

-against-

No. 47

CNY CENTRO, INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
February 18, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Palladino, number 47.
2 Counselor, would you like any rebuttal
3 time?

4 MR. RILEY: Five minutes, Your Honor,
5 please.

6 CHIEF JUDGE LIPPMAN: Five minutes, sure.
7 Go ahead, counsel.

8 MR. RILEY: Robert Louis Riley for the
9 plaintiff/appellant Eugene Palladino. May it please
10 the court, for twenty-four years and eleven months,
11 Eugene Palladino was an employee at Centro. For
12 twenty-four years and eleven months, he paid union
13 dues to the Amalgamated Transit Workers Union, Local
14 580.

15 CHIEF JUDGE LIPPMAN: Counsel, why - - -
16 why shouldn't the legislature decide the issue that
17 you're really pushing, to change the law when we have
18 a long-standing adherence, you know, to this
19 perspective that you have to name everybody within
20 the union? Why - - - why shouldn't this - - - is
21 there going to be a change, after all these years,
22 stare decisis? Why - - - why should we do this? Why
23 shouldn't the legislature - - - especially when they
24 just recently amended that statute not too long ago,
25 and didn't disturb the language the way it is now?

1 MR. RILEY: Well, because, I think that
2 this court has already undertaken that with regard
3 Madden v. Atkins. Also - - -

4 CHIEF JUDGE LIPPMAN: But that's been
5 interpreted more narrowly, right?

6 MR. RILEY: Well, no, I think - - -

7 CHIEF JUDGE LIPPMAN: For that particular
8 circumstance?

9 MR. RILEY: I think - - - yes, I'm sorry,
10 Your Honor. I think, and the premise of the argument
11 here, is that it's been interpreted too narrowly.
12 That the real gravamen of Madden v. Atkins is that
13 where an unincorporated association labor
14 organization has authorized the union management to
15 act on behalf of the union membership, then the union
16 is liable under those circumstances.

17 CHIEF JUDGE LIPPMAN: But again, why - - -
18 why wouldn't the legislature make that decision?
19 Even if there's one carve-out for Madden, why
20 wouldn't - - - why wouldn't this be something that
21 they would do - - -

22 MR. RILEY: Why do - - -

23 CHIEF JUDGE LIPPMAN: - - - when they - - -
24 when, again, they've amended the statute; haven't
25 changed that provision?

1 MR. RILEY: Well, Judge, I think that the
2 statute - - - first of all, the Taylor Law was
3 enacted in 1967.

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. RILEY: In 1990, the breach of duty of
6 fair representation was added as a statute with
7 regard to unfair labor practices. I think that with
8 regard to the legislature having to act, I think that
9 that is exactly what Judge Saxe was lamenting. I
10 think that's exactly what Judge - - - or Justice Saxe
11 was lamenting. I think it's exactly what Judge
12 Conway was lamenting with regard to the fact that - -
13 -

14 CHIEF JUDGE LIPPMAN: And it doesn't - - -
15 it doesn't matter that PERB now has additional powers
16 to - - -

17 MR. RILEY: No, be - - -

18 CHIEF JUDGE LIPPMAN: - - - deal with
19 certain situations?

20 JUDGE GRAFFEO: You could have brought this
21 claim - - - you could have brought a claim for the
22 lack of fair representation with PERB, couldn't you?

23 MR. RILEY: Yes, Your Honor.

24 JUDGE GRAFFEO: I understand your remedy
25 would - - - may have been different, but - - -

1 MR. RILEY: Yes, and that's - - -

2 JUDGE GRAFFEO: - - - that was an avenue -

3 - -

4 MR. WAGNER: Yes, and that's exactly right.

5 JUDGE GRAFFEO: - - - available.

6 MR. WAGNER: But I think that with regard
7 to the National Labor Relations Act, which was
8 enacted in 1947, and then with regard to the
9 enactment of PERB, the Taylor Law in 1967, the
10 National Labor Relations Board does not have
11 exclusive jurisdiction over unfair labor practices on
12 the federal level. PERB does not have exclusive
13 jurisdiction of unfair labor practices on the state
14 level.

15 JUDGE ABDUS-SALAAM: Counsel, what can you
16 get from the court that you couldn't get from PERB?
17 I was wondering that.

18 MR. RILEY: Well, it depends on what cause
19 of action that you want. It also - - -

20 JUDGE GRAFFEO: Is it - - - is it the money
21 damages, is that the issue?

22 MR. RILEY: Yeah, I think - - - yes. And I
23 think that there's an issue with regard to all of
24 that - - - money damages, collection of attorneys'
25 fees. There's an Appellate Division case with regard

1 to collection of attorneys' fees in an unfair labor
2 practices case. The causes of action that you may be
3 able to entertain before - - - in a court of law,
4 as opposed to before the Public Employee Relation
5 Board, which is an administrative agency. It has
6 limited jurisdiction with regard to what it can hear.

7 And I also think that there's an important
8 element of that with regard to what a particular
9 plaintiff wants to - - - the venue and the avenue
10 that a plaintiff wants to take with regard to where
11 he wants to litigate something.

12 JUDGE GRAFFEO: Are you asking us to set
13 aside the Martin case for all unincorporated
14 associations for everything from political parties,
15 right straight through to fraternal organizations?

16 MR. RILEY: No, Your Honor, I'm not going
17 that far. What I'm saying is if you take a look at -
18 - - and I understand the common law here with regard
19 to unincorporated associations, and the fact that
20 there was no liability absent the body of an
21 unincorporated association.

22 JUDGE READ: So you're just asking for a
23 union carve-out?

24 MR. RILEY: Yes, I'm asking for a union
25 carve-out - - -

1 CHIEF JUDGE LIPPMAN: But shouldn't the
2 legislature decide what to carve out and what not to
3 carve out?

4 MR. RILEY: Because - - -

5 CHIEF JUDGE LIPPMAN: So we're going to
6 change it for unions, and not change it otherwise?

7 MR. RILEY: Yes, because I think it's a
8 matter of common law. I think it's a matter of
9 common law with regard to - - - and just - - -

10 JUDGE SMITH: Why - - - why is it a matter
11 of the common law for unions, and not for any other -
12 - - why shouldn't we over - - - why should we just
13 overrule Martin and - - - and let whatever - - -
14 whatever the common law is apply?

15 MR. RILEY: Well, that's exactly right.
16 Overrule Martin so that there's no bar in the - - -

17 JUDGE SMITH: But you sat - - - you say you
18 only want it overrule it for unions?

19 MR. RILEY: Well, yes, at this point,
20 because I'm not - - - I think there is - - - when you
21 have an unincorporated association, let's say it's
22 set up like a union is set up. You have a
23 constitution and bylaws; you have a collective
24 bargaining agreement. And that gets into what Madden
25 v. Atkins said with regard to contract base - - -

1 basically it's in contract.

2 An unincorporated association labor
3 organization has specific duties to their members, to
4 the employees and to the members of a union, and
5 they've been codified in the law now.

6 JUDGE SMITH: Okay, but I - - - but I guess
7 I'm - - - I'm trying to focus on - - - the rule of
8 Martin, as I understand it, is that every member of
9 the association has to ratify or the - - - or the
10 association can't be sued. Is there any - - - is
11 there any association for that - - - for which that
12 rule makes sense, or that's a good rule?

13 MR. RILEY: No, there isn't, Your Honor.
14 And I - - - I would agree with you - - -

15 JUDGE PIGOTT: Well, how about - - -

16 MR. RILEY: - - - as far as that's
17 concerned.

18 JUDGE PIGOTT: How about the West Side
19 Little League in some small town that, you know, does
20 everything it can in an eleemosynary way for the - -
21 - you know, for the baseball thing, and all of a
22 sudden, they're getting sued, and their houses are in
23 - - - are in jeopardy, because somebody slipped and
24 fell in the - - - on second base. I don't know.

25 MR. RILEY: Well, I understand that, and

1 that's why I'm saying with regard to an
2 unincorporated association that has specific - - -
3 it's operated like a corporation. A labor
4 organization now are operated like a corporation.

5 JUDGE PIGOTT: They're very unique. I - -
6 - one of the things that occurred to me, though, is -
7 - - much like this one, if you have - - - if you have
8 a disciplinary, and it's been known that unions in
9 dealing with - - - with all of these, you know, may
10 say, look, you know, like they didn't go forward on a
11 couple of his, right?

12 So can - - - can every employee who thinks
13 that they were unfairly treated in their
14 disciplinary, either, you know, it was settled not to
15 their satisfaction, or something happened, or there
16 was - - - or there's a new rule change that they
17 don't like, that they can sue the union?

18 MR. RILEY: Oh, yeah. You're talking about
19 with regard to a labor organization here.

20 JUDGE PIGOTT: I'm saying if we take this
21 away - - - if - - - if we - - - this clearly is
22 designed to make it difficult to sue unions, I mean -
23 - -

24 MR. RILEY: Impossible.

25 JUDGE PIGOTT: Right. So if you make it

1 easy to sue unions, why wouldn't there then be, pick
2 your number of cases tomorrow by - - - by union
3 members who feel that whatever the union did was
4 unfair?

5 MR. RILEY: Well, Your Honor, that's
6 exactly right. But I think that with regard to - - -
7 that's the beauty of the Jackson decision. The
8 beauty of the Jackson decision is that it actually
9 lifted the language right out of Vaca v. Sipes, what
10 Justice White wrote in Vaca v. Sipes.

11 And I believe that that is that for you not
12 to be able to grieve a case, "it is contrary to
13 public policy relating to public as well as private
14 sectors of employment, where it is plain that public
15 employers and their employees' interests are best
16 served when grievances are heard and decided on the
17 merits."

18 And when you have somebody that's worked
19 for twenty-four years and eleven months for a
20 company, and you have - - - and paid union dues for
21 twenty-four years and eleven months, depending on the
22 fact that he would have financial security when he
23 retired, and in this case, lifetime health insurance
24 benefits, and we have a little thing going on with
25 the federal government called the Affordable Care Act

1 right now, and then all of a sudden, somebody doesn't
2 have those benefits, have lifetime health insurance
3 benefits, can't collect a pension, won't be able to
4 collect - - -

5 CHIEF JUDGE LIPPMAN: Again, what - - -
6 what's wrong with PERB - - - what was your answer?
7 What's wrong with going to PERB about it?

8 MR. RILEY: Well, as far as if I were a
9 person that was going to depend on a decision that
10 was going to affect the rest of my life, and I had a
11 chance to take it before an administrative agency or
12 I can take it, and I could litigate it in court and
13 have a jury of six people sitting there listening to
14 all of the evidence to make a decision on something
15 that's going to affect me for the rest of my life, I
16 would pick litigation and a courtroom any day.

17 JUDGE PIGOTT: Well, let's assume for a
18 minute that in the same context, that if the union
19 settles the case, all right, where - - - where
20 somebody's alleged to have committed some violations
21 as - - - as has happened here, and they say, tell you
22 what? You know, we'll give you - - - we'll give you
23 credit for, you know, an extra five years; you go
24 away, you know, have a happy life, and we're settled.
25 Why wouldn't the rest of the union members want to

1 sue the union saying you just gave away some of our
2 money?

3 MR. RILEY: Well, you know, I think that
4 that gets to the issue of what is a duty of breach of
5 fair representation.

6 JUDGE PIGOTT: But it's a lawsuit, though.
7 You want to be able to sue anything.

8 MR. RILEY: Right. No, no, no. I'm
9 talking about - - - I - - - we have a case here,
10 where I'm talking about somebody that was terminated
11 for allegedly misconduct.

12 JUDGE ABDUS-SALAAM: So you would limit
13 this case to - - - if - - - if we decided to - - -
14 decide - - - if we decided in your favor, you would
15 limit it to duty of fair representation cases, like
16 the Madden case is essentially limited to expulsion?

17 MR. RILEY: Well, yes, but I - - - and I
18 understand where you're going with this, and it's a
19 very - - - this is an extremely complicated subject
20 with regard to - - -

21 JUDGE SMITH: Well, suppose - - - suppose -
22 - - to take a more extreme case. Suppose a union is
23 mob-controlled and the union hires a hit man to kill
24 someone. Can the estate sue for - - - the union for
25 wrongful death - - -

1 MR. RILEY: Oh, no, no.

2 JUDGE SMITH: - - - without having every
3 member ratify - - - prove that every member ratified?

4 MR. RILEY: No, Your Honor, that's a - - -

5 JUDGE SMITH: No, they can't?

6 MR. RILEY: That's a criminal intervening
7 act. If you have somebody that goes out and murders
8 somebody - - -

9 JUDGE SMITH: I don't - - - I don't think
10 you're understanding my question. I'm talking about
11 the Martin case. The Martin case says that you can't
12 sue a union - - - I think only for intentional torts
13 or at least been held to mean only intentional torts
14 - - - unless the tort was ratified by every member of
15 the union. Are you saying that you would leave that
16 in place for, say, an assassination case?

17 MR. RILEY: Oh, no, no, no, Your Honor, no.
18 I wouldn't leave that in place. I wouldn't leave it
19 in place at all. I think Judge Saxe hit it right in
20 the head. Judge Conway hit it right on the head,
21 with regard to the lamentation with regard to - - -
22 that that should be jettisoned. Martin v. Curran, to
23 use the respondent's language, should be jettisoned.

24 CHIEF JUDGE LIPPMAN: So you would or
25 wouldn't limit it; what's your position?

1 MR. RILEY: Well, I'm - - -

2 CHIEF JUDGE LIPPMAN: What do you want us
3 to do?

4 MR. RILEY: Maybe I'm not understanding the
5 question, Your Honor. I said - - -

6 CHIEF JUDGE LIPPMAN: Is it a carve-out?
7 Or how much further are you going?

8 MR. RILEY: Well - - -

9 JUDGE GRAFFEO: Are you expanding Madden or
10 are you asking us to overrule Martin?

11 MR. RILEY: I'm asking you to overrule
12 Martin. I'm saying that Madden v. Atkins makes
13 perfect sense. I don't think that you need to expand
14 Madden v. Atkins, and here's why. Because I think
15 that when they say that it's limited to contract
16 cases, union expulsion cases are basically founded in
17 contract.

18 All of these issues are basically founded
19 in contract, when you're talking about an employee
20 and a union member, because you have a collective
21 bargaining agreement, and you have a constitution and
22 bylaws.

23 JUDGE GRAFFEO: So if we're over - - - if
24 we agree with you and overrule Martin, then we're not
25 limited to just unions?

1 MR. RILEY: No, I think that that is for
2 the court to decide. I'm asking here today that with
3 regard to unions, and you take a look at the federal
4 law, and you take a look at how unions - - -

5 JUDGE GRAFFEO: You want us to carve unions
6 out of Martin?

7 MR. RILEY: For what I'm saying right now,
8 yes.

9 JUDGE GRAFFEO: I'm still trying to figure
10 out the parameters of what you're asking us to do.

11 MR. RILEY: Well, I'm asking you, because
12 this is a union case, and because I have a client
13 that was an employee and a union member, under these
14 circumstances, I believe that Madden v. Atkins is
15 very clear. I believe that he had contract rights as
16 well as the fact that the court was very eloquent
17 with regard to where you have duly elected union
18 officials that are authorized and empowered to act on
19 behalf of the union, that the union's funds are held
20 liable.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 You'll have your - - - you'll have your rebuttal.

23 MR. RILEY: Thank you.

24 CHIEF JUDGE LIPPMAN: Let's hear from your
25 adversary.

1 MR. WAGNER: Good afternoon.

2 JUDGE READ: What are you asking us to do?

3 CHIEF JUDGE LIPPMAN: You represent Watson?

4 MR. WAGNER: I'm sorry, Your Honor?

5 CHIEF JUDGE LIPPMAN: You represent - - -

6 MR. WAGNER: Oh, yes. Kenneth L. Wagner,
7 Blitman & King, for the union respondents, the union
8 defendants, Mr. Watson and ATWU Local 580.

9 CHIEF JUDGE LIPPMAN: Okay, go ahead,
10 counsel.

11 MR. WAGNER: I'm asking the court to leave
12 the Fourth Department's decision as it stands.

13 CHIEF JUDGE LIPPMAN: On what ba - - -
14 what's your best argument?

15 MR. WAGNER: Well - - -

16 CHIEF JUDGE LIPPMAN: It it stare decisis?
17 Is it - - -

18 MR. WAGNER: Certainly, Your Honor, that -
19 - -

20 CHIEF JUDGE LIPPMAN: Leave it to the
21 legislature? What's your argument?

22 MR. WAGNER: Reasonable minds can differ
23 whether the policy embodied under the common law and
24 affirmed in the Martin decision ought to continue to
25 be applied. But I - - - I think that it's very clear

1 that under the principles of stare decisis under a
2 genuine application of those principles to this case,
3 there should be no change - - -

4 JUDGE SMITH: Well, you say reasonable
5 minds can differ. Make - - - make the case for the -
6 - - make a reasonable case for the rule of Martin,
7 that every member of the union has to ratify the act.

8 MR. WAGNER: It has to do with the
9 conception of the common law that unincorporated
10 associations are not separate entities.

11 JUDGE SMITH: I understand, but Judge
12 Conway in dissent in Martin, pointed out that doesn't
13 mean that every member has to ratify. He - - - so
14 there are 1,000 of them. They can hire an agent and
15 be responsible for the agent's acts, can't they?

16 MR. WAGNER: Well, Your Honor, Martin
17 decided that - - - or the common law had that view.
18 Martin decided that the legislature - - -

19 JUDGE SMITH: I guess what I wanted to say
20 - - - didn't - - - didn't Martin simply miss - - -
21 simply get the common law wrong?

22 MR. WAGNER: I do - - - I don't think so,
23 Your Honor. I don't think anybody's suggesting that,
24 but the common law, it's - - - it's a harsh rule, but
25 it's not for this court to - - -

1 the plaintiff's attorney, I would - - - in this kind
2 of case, I would not bring my case to Supreme Court.
3 I would bring it to PERB.

4 JUDGE PIGOTT: PERB, all right, but as - -
5 -

6 MR. WAGNER: Yeah.

7 JUDGE PIGOTT: - - - as your opponent
8 argues there's reasons why they don't want to go to
9 PERB. And if they want to bring a plenary action,
10 how, in your view, would that - - - would you do that
11 in light of Martin?

12 MR. WAGNER: There's no question, Your
13 Honor, that what - - - especially with a large union,
14 it is going to be exceedingly difficult if not
15 impossible - - -

16 JUDGE PIGOTT: Right, so how would you do
17 it?

18 MR. WAGNER: - - - to show that.

19 JUDGE PIGOTT: So how would you do it?

20 MR. WAGNER: Sorry?

21 JUDGE PIGOTT: How would you do it? I
22 mean, we can't say there's no remedy and therefore
23 unions can do anything they want. There - - - we're
24 - - -

25 MR. WAGNER: No, no.

1 JUDGE PIGOTT: What you're arguing is that
2 they're an unincorporated association. They can be
3 sued. So, but you have to do what? You have to
4 serve every member of the union?

5 MR. WAGNER: No, you don't have to serve
6 every member. You have to show that every member
7 unanimously authorized or subsequently ratified the
8 conduct - - -

9 JUDGE RIVERA: And - - - and the way unions
10 work today, how would that ever be possible? How
11 would you ever show that?

12 MR. WAGNER: I - - - in - - - in a small
13 union, it might be possible. In a large union, it is
14 not going to be possible.

15 JUDGE GRAFFEO: That was going to be my
16 question.

17 MR. WAGNER: But that - - - that's no - - -

18 JUDGE GRAFFEO: That was going to be my
19 next question - - -

20 MR. WAGNER: Yeah.

21 JUDGE GRAFFEO: - - - because the larger
22 the union, the more you're immune from suit. So it's
23 not even really that fair amongst unincorporated
24 associations. The larger the organization, the more
25 impossible it is to bring a litigation.

1 MR. WAGNER: These are all arguments that
2 could be brought to the legislature to change the
3 entire law regarding unincorporated associations.

4 CHIEF JUDGE LIPPMAN: Do you think that - -
5 -

6 JUDGE GRAFFEO: Well, we kind of did it in
7 Madden, right? I mean, we did carve out an exception
8 in Madden. So why shouldn't we expand Madden? Tell
9 me the rationale for why wrongful expulsion cases
10 should be so much different from breach of - - -
11 breach of fair representation?

12 MR. WAGNER: Well, putting aside the point
13 that the plaintiff does have a remedy before PERB,
14 but the distinguishing features between Madden v.
15 Atkins and a duty of fair representation case, that
16 was a breach of contract theory. This court held in
17 Madden that where there is an elaborate procedure for
18 a disciplinary process under the union constitution,
19 and a member has been expelled pursuant to that
20 disciplinary process, and the disciplinary process
21 involved substantial involvement of the membership,
22 so the trial committees that were formed, the charges
23 that were preferred, the trials that were held, the
24 ratification of the trials after the fact, were all
25 involving membership - - - all involved membership

1 participation.

2 And the court, I think, did not so much
3 find an exception to the Madden rule as a substantial
4 compliance with - - - with the Martin rule, excuse me
5 - - - in Madden, the court found - - -

6 JUDGE GRAFFEO: Because of the extent of
7 the membership involvement - - -

8 MR. WAGNER: - - - there was substantial
9 compliance with - - -

10 JUDGE GRAFFEO: - - - is what you're - - -
11 because of the extent of membership involvement?

12 MR. WAGNER: That's right, Your Honor. We
13 say that in the brief and - - -

14 JUDGE GRAFFEO: That's what distinguishes
15 these two different claims?

16 MR. WAGNER: That's why the court, just a
17 few years after, holding that the common law applied
18 and was still extant in Martin - - -

19 JUDGE RIVERA: Are you arguing that - - -

20 JUDGE GRAFFEO: But here - - - here the
21 executive committee was unanimous, right? So
22 presuming they represent the membership, would that
23 be akin to membership involvement?

24 MR. WAGNER: No, Your Honor, because that -
25 - - it would be an exception that essentially

1 swallows the rule. The rule is that under Martin,
2 that - - - and under the common law - - - that
3 there's no delegation of authority, and that under
4 agency principles they don't apply. In this context
5 you have to have direct - - -

6 JUDGE RIVERA: So it's not - - - it's not
7 the - - -

8 MR. WAGNER: - - - involvement of the
9 entire membership.

10 JUDGE RIVERA: It's not the delegation;
11 it's the actual conduct. Even if the conduct does
12 not result in a formal ratification, the conduct in
13 and of itself constitutes what is equivalent to a
14 ratification. That's what you're saying? Is that
15 the difference in Madden?

16 MR. WAGNER: There was direct participation
17 by the membership in the Madden case - - - underlying
18 facts in the Madden case, yes, Your Honor.

19 JUDGE SMITH: Do you - - -

20 JUDGE RIVERA: You landed out taking
21 ratification before the action - - - I mean, formal
22 ratification before the action, but it was enough to
23 constitute the kind of conduct that we recognize.
24 That's what you're saying? Is this the - - -

25 MR. WAGNER: Yes, Your Honor, yes.

1 JUDGE SMITH: Do you - - - there are a
2 number of Appellate Division cases that say that
3 Martin doesn't apply to negligence cases. If the
4 union is sued for a slip-and-fall or whatever, they
5 can - - - they can be sued like everyone else. Is -
6 - - are those - - - does that - - - is that right?
7 Is that - - -

8 MR. WAGNER: That's right. The
9 unintentional tort exception - - -

10 JUDGE SMITH: So why - - - why should the
11 union be more protected, when instead of a guy
12 slipping and falling, the - - - the auth - - - yeah,
13 the union sends people out to beat him up with
14 baseball bats? Why is the union better off in that
15 situation?

16 MR. WAGNER: Well, it - - - that exception
17 was created in a Torres v. Lacey case. I don't think
18 this court has ever approved that - - -

19 JUDGE SMITH: Well, are you saying we
20 should reject it so that - - - they - - - unions
21 should be effectively immune from all torts?

22 MR. WAGNER: That - - - it's simply not
23 involved in this case, Your Honor. That's a
24 negligence standard that is incompatible with a duty
25 of fair representation claim - - - standard. Our

1 case doesn't - - -

2 JUDGE SMITH: Well, I guess - - -

3 MR. WAGNER: - - - depend on that at all.

4 JUDGE SMITH: - - - I guess that's the next
5 question. If you assume that intentional torts are -
6 - - do have, what you might call, Martin immunity,
7 and negligence - - - negligent ones don't, why should
8 we classify the duty of fair representation cases as
9 intentional rather than negligent?

10 MR. WAGNER: Certainly, Your Honor. I
11 anticipated that. The DFR standard under New York
12 law as well as federal law is conduct that is
13 arbitrary, discriminatory or in bad faith. Those
14 latter two prongs, discrimination - - - invidious
15 discrimination, or bad faith conduct is clearly
16 intentional wrongdoing, and the arbitrary standard is
17 - - - can involve unthinking or unintentional
18 conduct, but it has to be so unreasonable - - - so
19 far outside the wide range of reasonableness that's
20 afforded to unions in their discretion - - -

21 JUDGE SMITH: I see the point.

22 MR. WAGNER: - - - that it's - - -

23 JUDGE SMITH: What you're really saying - - -

24 -

25 MR. WAGNER: - - - it's essentially

1 intentional conduct.

2 JUDGE SMITH: You're really saying the
3 worse - - - the worse we are, the less liable we are.

4 MR. WAGNER: Well, that's what you have to
5 prove in order to prevail on a DFR case if you're the
6 plaintiff, and that is essentially - - -

7 JUDGE SMITH: Okay, I understand that, but
8 - - - but aren't you really saying that the worse the
9 offense, the harder it should be to sue unions, and
10 isn't that a very perverse rule?

11 MR. WAGNER: I don't think so, Your Honor.
12 The DFR standard requires that that's what a
13 plaintiff show. And that is clearly on the side of
14 the intentional tort part of the ledger, and as far
15 afield from the unintentional tort exception that's
16 been recognized by some lower courts.

17 CHIEF JUDGE LIPPMAN: Okay, thanks,
18 counselor.

19 MR. WAGNER: Thank you, Your Honor.

20 MR. ATLAS: If it pleases the court, Craig
21 Atlas, representing respondents CNY Centro.

22 CHIEF JUDGE LIPPMAN: Right. Go ahead,
23 counsel.

24 MR. ATLAS: If I may, in a minute, I'd like
25 to get to the liability of Centro, but if I could,

1 Your Honor - - -

2 CHIEF JUDGE LIPPMAN: Sure.

3 MR. ATLAS: - - - I'd like to clarify a
4 couple of points immediately - - -

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. ATLAS: - - - of counsel before. This
7 is not only a case based on following the common law.
8 This is a case involving the statute Section 13 of
9 the General Associations Law.

10 JUDGE SMITH: Which language of that
11 statute says what Martin says?

12 MR. ATLAS: Your Honor, it has the language
13 that says basically that - - - that a plaintiff may -
14 - - may maintain an action or special proceeding
15 against an unincorporated association if the
16 plaintiff may maintain such an action or special
17 proceeding "against all the associates". And that
18 was interpreted as - - - as meaning that the
19 plaintiff must first - - -

20 JUDGE SMITH: Yeah, but - - - yeah, but
21 isn't it a step from - - - I mean, it - - - I assume
22 - - - assume it's right that if you're
23 unincorporated, like you're a general partnership,
24 yeah, the part - - - you can sue all the partners for
25 the acts. But - - - but isn't it a step from there

1 to say that every partner has to authorize or ratify
2 the act?

3 MR. ATLAS: Your Honor, that's been the
4 language of the statute. It's the language of the
5 Code of Civil Procedure going back to 1880 - - -

6 JUDGE SMITH: I - - - I understand.

7 MR. ATLAS: That's the way the cases - - -

8 JUDGE SMITH: I understand that. I don't
9 see in that language anything about authorization or
10 ratification. Do you?

11 MR. ATLAS: Well, that is - - - that's the
12 way that the court - - - this court in Martin - - -

13 JUDGE SMITH: It's a - - - I guess, that's
14 what, sort of, I'm getting - - - isn't Martin really
15 a common law decision, not a matter of statutory
16 interpretation?

17 MR. ATLAS: Well, Your Honor, I believe it
18 was reflecting the common law going back before 1880,
19 as well as the statute that was codified in 1880 and
20 then again in 1920.

21 CHIEF JUDGE LIPPMAN: Does it matter
22 whether it's statutory or pursuant to common law?

23 MR. ATLAS: Yes, Your Honor. If it's
24 pursuant to common law, then the principle of stare
25 decisis applies, and the court may consider the

1 factors you usually consider as far as whether to
2 continue to adhere to press or not.

3 CHIEF JUDGE LIPPMAN: That the statutory
4 and it's important - - -

5 MR. ATLAS: The standard for - - -

6 CHIEF JUDGE LIPPMAN: - - - by the
7 statutory language?

8 MR. ATLAS: If it's statutory, then there's
9 also the principle of separation of powers, as Your
10 Honor first asked Mr. Riley, isn't this up to the
11 legislature? That I would submit, Your Honor, is
12 what this court said in 1951 and there's nothing
13 that's happened since then - - -

14 JUDGE SMITH: Is it - - - is it of some - -
15 - I guess, stare decisis, you would agree with me for
16 both common law and statutory decisions. If we
17 interpret a statute, that's stare decisis, too.

18 MR. ATLAS: Correct, Your Honor.

19 JUDGE SMITH: But - - - but is there some
20 difference between whether we're fixing our own
21 mistake or trying - - - or fixing - - - I mean, yeah
22 - - - we can't fix the legislature's mistakes, but we
23 can fix our own, right?

24 MR. ATLAS: I agree completely, Your Honor.
25 That - - - and as - - - as this court recognized - -

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JUDGE SMITH: Then why - - - then why was Martin - - - when you read the majority and the dissent in Martin, why wasn't Judge Conway right? Why - - - why wasn't Martin just - - - just plain wrong?

MR. ATLAS: Because, Your Honor, the legislature made the policy decision in Section 13 of the General Associations Law to craft the statute the way it did. If the legislature wants to, there are any number of ways - - -

JUDGE SMITH: Yeah, but I - - - but I don't think the statute says anything about whether every member has to ratify or approve.

MR. ATLAS: Well, it says that the - - - it must be in the action - - - the plaintiff must have an action that he may maintain against all of the associates - - - each - - - each and every one.

JUDGE SMITH: Yeah, and what - - - and what Judge Conway's dissent says, in - - - on the facts of Martin, of course, the plaintiff could have sued all the members, because the members owned the newspaper that published the libel. And you can sue the owner of a newspaper that publishes a libel, whether he ratified the libel or not. What's wrong with Judge

1 Conway's reasoning?

2 MR. ATLAS: Well, Your Honor, with all due
3 respect, that was the dissenting opinion. That was
4 not the majority opinion, which is - - -

5 JUDGE SMITH: Your answer is what's wrong
6 with it - - -

7 MR. ATLAS: - - - of course, which we are
8 about - - - which we - - -

9 JUDGE SMITH: What's wrong - - - it's a
10 fair answer - - - what's wrong with it is that it
11 lost, and we should stick with stare decisis, is what
12 you're saying.

13 MR. ATLAS: Yes, Your Honor.

14 The other point I'd like to clarify, the
15 nature of a duty of fair representation claim is not
16 the same as a breach of contract claim as the court
17 addressed in *Madden v. Atkins*. *Madden* - - - in
18 *Madden v. Atkins*, the court looked at the
19 relationship between the union and its members - - -
20 its members as a - - - as a contract.

21 The duty of fair representation, however,
22 does not apply only to members of the union. It
23 applies to all employees in the bargaining unit that
24 the union represents. As a matter of fairness, if
25 the union is the exclusive representative - - -

1 collective bargaining representative of the
2 bargaining unit, it has a duty towards all the
3 employees in that union.

4 JUDGE PIGOTT: Yeah, but that raises that
5 problem that if - - - if you're not a member of the
6 union, but you're still covered by them, and you get
7 sold out by the union. Not that unions ever sell
8 anybody out, but if they say, I'll tell you what.
9 You bring Ted back; we won't - - - we won't push
10 Sally's case. There ought to be a lawsuit there.

11 MR. ATLAS: And, Your Honor, then there is
12 - - - there is the possibility of a lawsuit for the
13 breach of the duty of fair representation.

14 JUDGE PIGOTT: In PERB.

15 MR. ATLAS: If I may, on the issue of the
16 liability of the employer that I represent - - -

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. ATLAS: In this particular case, we
19 have raised as an affirmative defense the Martin
20 defense. So the record reflects that we've raised it
21 in the answers to both of the plaintiff's complaints.

22 Also if I may point out, in one of the
23 cases cited in the briefs, Yoonessi v. State of New
24 York, a Fourth Department case, the employer there
25 was allowed to basically rely on defenses that the

1 union could have to a DFR claim, including in that
2 particular case, a statute of limitations and
3 collateral estoppel. And I would respectfully submit
4 that in this case, the employer may rely on the
5 Martin defense.

6 CHIEF JUDGE LIPPMAN: Thanks, counsel.

7 MR. ATLAS: Thanks; thank you.

8 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

9 MR. RILEY: Yes, Your Honor. The General
10 Associations Law Section 13, as you pointed out here,
11 is a procedural statute. It is not substantive under
12 any stretch of the imagination. It is - - - was
13 enacted for the convenience of a plaintiff. That's
14 all.

15 Then you look to the common law and that's
16 what we're talking about with the - - - with the
17 unanimous ratification rule, and why it's not
18 applicable to an unincorporated association labor
19 organization. The federal courts recognized this
20 decades ago. The Coronado Mine decision, they've
21 jettisoned unanimous ratification rule, because it's
22 unworkable. It's a standard of impossibility.

23 CHIEF JUDGE LIPPMAN: Yeah, but we have - -
24 - we have over and over again adhered to that rule.

25 MR. RILEY: Your Honor, I think that the

1 courts - - - that's what this is all about - - -

2 CHIEF JUDGE LIPPMAN: Yes, I understand.

3 MR. RILEY: - - - as far as the courts - -

4 - because the courts in this state are all - - -

5 CHIEF JUDGE LIPPMAN: But I'm saying

6 despite the fact of the federal changes, you've had -

7 - - this statute has been acted on by the legislature

8 and they haven't changed this provision.

9 MR. RILEY: Well, the legislature hasn't

10 even acted with regard to this. And I think that - -

11 -

12 CHIEF JUDGE LIPPMAN: But that's the point.

13 That they - - -

14 MR. RILEY: Well, they said - - - right.

15 CHIEF JUDGE LIPPMAN: - - - haven't acted

16 in regard to this.

17 MR. RILEY: But I believe that this court

18 as a matter - - -

19 CHIEF JUDGE LIPPMAN: But the court should

20 replace the legislature?

21 MR. RILEY: No, the court shouldn't replace

22 the legislature. That's the beauty of our system.

23 When the courts don't act, the legislature acts. If

24 the legislature acts, and the legislature - - -

25 CHIEF JUDGE LIPPMAN: But as - - - as Judge

1 Smith said before, we can't correct their mistakes,
2 if they - - - that's what they wanted to do.

3 MR. RILEY: Well, well if - - -

4 CHIEF JUDGE LIPPMAN: Even if we think it's
5 a mistake.

6 MR. RILEY: Well, it depends. If the
7 statute is unconstitutional, you certainly can.

8 JUDGE RIVERA: But we can't - - - we can't
9 correct the policy choices - - - their policy
10 choices.

11 MR. RILEY: No, you can't correct their
12 policy choices, but this is about common law. This
13 is about the evolution of labor organizations and the
14 recognition that they operate as corporations, and
15 that the application of a unanimous ratification rule
16 would give them blanket immunity and it is - - - it
17 violates public policy.

18 JUDGE SMITH: Well, what about - - - well
19 what about stare decisis? Why shouldn't - - - why
20 isn't Martin a stare decisis case?

21 MR. RILEY: Your Honor, I don't mean to be
22 cute when I say this, but I think Ralph Waldo Emerson
23 said it the best: a foolish consistency is the
24 hobgoblin of little minds. Stare decisis is about
25 changing the law. Common law is fluid with regard to

1 what happens in society.

2 JUDGE RIVERA: So what's - - - what's
3 different now?

4 MR. RILEY: What's different now?

5 JUDGE RIVERA: Than your client lost.

6 MR. RILEY: The evolution of labor
7 organizations and the representation and the duties
8 that are impressed upon the federal - - -

9 CHIEF JUDGE LIPPMAN: When did that change,
10 the evolution of labor organizations? That would - -
11 -

12 MR. RILEY: It's been - - -

13 CHIEF JUDGE LIPPMAN: - - - that would
14 warrant changing Martin now. When - - - when is that
15 - - - is there something recent that's happened?

16 MR. RILEY: No, decades and decades. I
17 can't explain to the court why New York State has not
18 caught up with the federal government, the federal
19 legislation for so many years.

20 JUDGE SMITH: Our court - - - as far as you
21 know, since Martin was decided in 1951, has our court
22 ever followed it or applied it?

23 MR. RILEY: Ever follow - - - I don't - - -
24 I believe that this was it. We were here to make a
25 determination with regard to - - -

1 JUDGE SMITH: But I mean, in - - - in
2 between, we - - - in Madden we carved out an
3 exception. Is that the whole - - - I mean, I
4 understand there are a lot of Appellate Division
5 decisions. But has our court ever done anything
6 about Martin except for that?

7 MR. RILEY: Your Honor, I - - - I don't
8 believe so. I don't - - -

9 JUDGE GRAFFEO: Do you know what other
10 states do? Do they have other provisions?

11 MR. RILEY: Oh, yes, I believe - - - I
12 believe that with regard to the other states as far
13 as duty of fair representation, they've jettisoned a
14 rule with regard to unanimous ratification as well.
15 And also - - -

16 CHIEF JUDGE LIPPMAN: Who's - - - who's
17 they? Who's they?

18 MR. RILEY: Your Honor, that - - - Your
19 Honor, that's - - -

20 JUDGE GRAFFEO: That's the majority rule or
21 just some states? Do you have any idea?

22 MR. RILEY: Well, from - - - I don't want
23 to misspeak with regard, but I have read that other
24 states, and I believe it's a majority of the states,
25 do not follow the Martin v. Curran rule. Okay? I

1 can't stand here and give you citation after citation

2 - - -

3 CHIEF JUDGE LIPPMAN: No, no. That's fair
4 enough, counselor.

5 MR. RILEY: - - - with regard to that.

6 But also, there are a couple of other
7 points here. The duty of fair representation, and
8 this is what I've been trying to get to with regard
9 to the different aspects of duty of fair
10 representation, because union management wears a lot
11 of different hats with regard to what they do.

12 They are the exclusive agent for
13 negotiating the collective bargaining agreements, for
14 making decisions. They're going to be differences in
15 - - - differences of opinion, with regard to union
16 factions within the union itself. And they have to
17 have discretion on how to negotiate contracts.

18 With regard to the grievance procedure, if
19 you take a look at the PERB decisions, and if you go
20 back to Vaca v. Sipes, and Justice White's decision,
21 which is a very interesting decision for a number of
22 reasons. But you take a look at two times in his
23 decision, he went out of his way to say that
24 perfunctory conduct in the prosecution of a
25 grievance, could amount to a breach of duty of fair

1 representation.

2 Perfunctory conduct is not intentional
3 conduct, no matter how much they'd like it to be.
4 Perfunctory conduct is characterized "by routine or
5 superficiality, mechanical lacking in interest or
6 enthusiasm," which is exactly what went on here.
7 There was no representation by this union with regard
8 to Mr. Palladino.

9 And one thing I was concerned about when I
10 read the case summary before I came into this
11 courtroom, if you take a look at the facts of what
12 happened with regard to the October 5, 2007 call-in,
13 and this is very important, because Mr. Palladino did
14 not violate the collective bargaining agreement in
15 either case, either on October 5, 2007 or August
16 19th, 2008.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 Thanks, counselor. Thank you all.

19 MR. RILEY: Thank you.

20 CHIEF JUDGE LIPPMAN: Appreciate it.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Palladino v. CNY Centro, Inc., No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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